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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ZACHARY TYLER GONZALEZ, Defendant and Appellant.	F075355 (Super. Ct. No. 16CMS2176A) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Zachary Tyler Gonzalez was convicted of robbery and first degree murder with a robbery special circumstance, with additional firearm enhancements and a prior prison term enhancement. On appeal, he contends the trial court prejudicially erred

in refusing to strike testimony that referred to him as "the terror." He also contends the court erred in admitting evidence his identification card was found on the street near his home, which evidence he contends was irrelevant and constituted fruit of an unlawful search. He further contends the evidence is insufficient to support his convictions for murder and robbery, and to support the robbery special circumstance. Finally, he argues the court erroneously imposed the same prior prison term enhancement on both counts. We also requested supplemental briefing on the effect of relatively recent amendments to the law governing firearm enhancements.

On April 4, 2019, we issued an unpublished opinion (*People v. Gonzalez* (Apr. 4, 2019, F075355), in which we rejected Gonzalez's contentions on appeal but remanded for the trial court to exercise its discretion to consider striking Gonzalez's firearms enhancements. Thereafter, Gonzalez filed a petition for rehearing in which he asked us to vacate the fines and assessments imposed by the trial court and to direct the trial court on remand to hold a hearing on his ability to pay in light of the Second District Court of Appeal's recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

On April 12, 2019, we granted rehearing and vacated our opinion. We now once again reject Gonzalez's contentions on appeal and remand for the trial court to exercise its discretion to consider striking the firearms enhancements. We do not strike the fines and assessments imposed by the trial court but hold that Gonzalez may request a hearing on his ability to pay on remand. In all other respects, we affirm.

PROCEDURAL HISTORY

Gonzalez was charged with first degree murder with a robbery special circumstance (Pen. Code, §§ 187, subd. (a), 189, subd. (a), 190.2, subd. (a)(17); [1] count 1), and robbery (§ 211; count 2). As to both counts, the information alleged firearm enhancements pursuant to section 12022.53, subdivisions (b), (c), (d), and (e)(1).

[1] All further statutory references are to the Penal Code, unless otherwise noted.

The information further alleged Gonzalez suffered a prior prison term. (§ 667.5, subd. (b).) The matter was tried to a jury. The original jury deadlocked and the court declared a mistrial.

The matter was tried anew to a second jury, which found Gonzalez guilty on both counts and found the special circumstance and firearm enhancements to be true. In bifurcated proceedings, Gonzalez admitted one prison prior.

On count 1, the court sentenced Gonzalez to life without the possibility of parole for the murder with special circumstance, plus 25 years to life on the firearm enhancement pursuant to section 12022.53, subdivision (d), and one additional year for the prison prior, for a total term of 26 years to life, plus life without the possibility of parole. The sentence on count 2 was stayed, but was comprised of a five-year term for robbery, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), and an additional year for the prison prior. The court also stayed sentence on the section 12022.53, subdivision (b) and (c) enhancements.

FACTUAL BACKGROUND

On June 17, 2016, shortly after 11:00 p.m., Julio G.[2] was shot at close range between 14 and 19 times while he was walking along a dirt path between East Cameron Street and Sierra Liquor in the city of Hanford. Most of the gunshot wounds were to his head, with additional gunshot wounds to his neck, abdomen, back, arm, and hand. He died of his injuries. His wallet, phone, necklace, watch, baseball cap, and left shoe were missing. Other personal property and his right shoe were strewn along the path.

Eyewitness Testimony

Residents in the area called 911 and later spoke with police and testified at trial. Gary B. lived in an apartment to the north of the dirt field and dirt path, and which was

[2] To protect the privacy of the victim and percipient witnesses, we refer to them only by first name. No disrespect is intended.

separated from the field by a chain link fence. He was sitting on his couch watching television with his windows and front door open when he heard two gunshots coming from the field. He ran outside, where he heard roughly four more shots. His wife called 911. He looked through the chain link fence and saw a slim man with short hair in a light-colored shirt approximately 60 to 70 yards away in the field. The man was stumbling as if he had been in a fist fight. Gary couldn't tell whether the man was trying to pick something up off the ground or trying to get up off the ground. The man "took off running" south before turning west on East Cameron Street. About 10 to 15 minutes later, police arrived and illuminated the field. Gary saw a person lying on the ground in the area where the man had been stumbling.

Katherine P. lives on East Cameron Street, to the west of the dirt path. She was in her living room when she heard approximately nine gunshots coming from the east. She exited onto her front porch where she saw Gonzalez, approximately 250 feet away, running west. She had a clear view of the right side of his face for a second or two. He was wearing a two-tone shirt that was white with dark sleeves.

Katherine testified that Gonzalez ran into a breezeway entrance on the north side of the L&L Apartments (located at the intersection of East Cameron Street and North White Street), then exited a few seconds later on the south side of the apartments and onto North White Street. He proceeded toward a house occupied by the Gonzalez family on the west side of North White Street, a few houses south from the intersection with East Cameron Street (hereinafter referred to as the Gonzalez residence or North White Street residence). Katherine lost sight of Gonzalez before he entered the house. She then called 911.

After officers arrived on scene, Katherine waved one of them down and provided a brief statement. Afterward, she observed a dark, subcompact car driving slowly north on North White Street before stopping across the street from and slightly north of the Gonzalez residence. She previously had seen a similar car at the Gonzalez residence.

She then saw a person run from the west side of the street, around the back of the car, and get into the front passenger side of the vehicle. She could not see who the person was but he appeared similar in build to Gonzalez. The car drove north on North White Street and turned east on Cameron Street, nearly driving into Katherine's yard en route.

Katherine had lived in her residence for 25 years and in the neighborhood her entire life. She knew the Gonzalez family because they lived in the neighborhood on two separate occasions. She did not know Gonzalez's first name but was sure he was the middle of three brothers. At trial, she could not recall whether she told a police officer that the person she saw running was the older or middle Gonzalez brother.

Since 2013, she had seen Gonzalez in the neighborhood nearly every day. She had seen him outside the North White Street residence. She also had seen him earlier on the day of the shooting. That afternoon, she observed Gonzalez walk north on North White Street and turn east on East Cameron. He had a "botched" haircut and was dressed differently than when she saw him later that evening.

In the early morning hours following the shooting, Katherine was shown three photo line-ups, each containing photographs of six individuals. One of the line-ups contained a photograph of one of Gonzalez's brothers. Katherine told the officer one of the individuals could be the person she saw but she wasn't sure. On June 21, 2016, an officer conducted an in-field show-up, in which Katherine immediately identified Gonzalez as the person she had seen.

Sierra Liquor Employees

Employees of Sierra Liquor testified to the events immediately preceding the shooting. Jesus M. identified Gonzalez as a regular customer who would come to Sierra Liquor two to three times per day. Jesus was taking out trash from the kitchen at approximately 10:40 p.m. when he saw Gonzalez walking toward the store near the area where the dirt path enters the Sierra Liquor parking lot.

Mercedes H. also identified Gonzalez as a regular customer. On the night in question, Mercedes began manning the register at 10:50 p.m. Gonzalez came into the store before 11:00 p.m., wearing a white shirt with another light color on it. At approximately 11:00 p.m., Mercedes's coworker, Roy R., made two trips outside to dispose of trash and remained outside to smoke. Around the same time, Mercedes sold a "Swisher" cigar to another regular customer.[3] Gonzalez was still in the store during that transaction. Roy was outside smoking when Gonzalez left the store. Mercedes observed Gonzalez exiting the store to the right, in the direction of the dirt path. Somewhere between a "couple seconds" and two minutes after Gonzalez left, Roy came back into the store "real rushy" and stated that "someone got blasted."

Roy also testified that Gonzalez was a regular customer who Roy saw at the store that night. Roy was outside and had just begun smoking a second cigarette when Gonzalez exited the store. Roy observed that Gonzalez turned right, in the direction of the dirt path, but Roy didn't see whether Gonzalez ultimately took the path or the road. A few minutes afterward, Roy heard approximately nine loud gunshots. He finished his cigarette and went inside. He did not see Gonzalez after hearing the shots.

The manager of Sierra Liquor testified that he had known Gonzalez for 12 or 13 years and had regularly observed Gonzalez using the dirt path to arrive at the store. The manager described himself and Gonzalez as "gun enthusiasts" and testified they would regularly discuss guns. Approximately three months prior to the shooting, Gonzalez brought a .40 caliber Glock handgun into the store and showed it to the manager. The manager asked Gonzalez not to bring the gun into the store again and, as

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[3] Mercedes testified that she sold the Swisher at approximately 11:00 p.m. Register receipts from Sierra Liquor for the night in question appear to show the Swisher transaction at 10:17 p.m. Mercedes testified the time stamp on the receipt was inaccurate. The manager testified that he did not know how to program the time on the registers. Other testimony indicated the time on the register receipts was off by approximately 45 minutes.

far as he knew, Gonzalez complied. Gonzalez also showed the manager an Instagram photo of an extended magazine, but the manager didn't know whether the photo was on Gonzalez's account or what caliber of weapon the magazine was for.

The manager went to the store after being informed of the shooting by employees. He attempted to obtain the store's surveillance video footage but learned the cameras weren't working.

Evidence Regarding the Victim

Julio's mother testified that she last saw him at her home in Hanford at 3:30 p.m. on the day he was killed. At that time, Julio had his cell phone and was wearing a rope gold chain, a watch, and Vans shoes. He also had his wallet; he had just gotten paid and gave his mother $100. Julio's mother testified that he also had two pairs of sunglasses. She did not find any of these items in her house after his death. She identified as Julio's sunglasses and a shoe found at the scene of the shooting.

Phillip R. testified that he was Julio's best friend. Sometime after 5:00 p.m. on the night Julio was killed, Phillip met Julio at the apartment of their mutual friend, Mike. At some point that evening, Phillip and Julio went to Bubba's Liquor in Phillip's car. Surveillance photographs taken from Bubba's Liquor show Julio wearing a necklace, sunglasses, a watch, and a hat. Phillip also testified that Julio had sunglasses, a cell phone, and a lottery ticket in his possession, and ordinarily carried "circle ball" Mexican candies. Phillip and Julio returned to Mike's apartment, smoked a Swisher, and went to sleep. At approximately 10:00 p.m., Phillip left the apartment to go home. Julio was awake but stayed behind. Phillip did not find Julio's necklace, wallet, or lottery ticket in his car after Julio's death. Phillip identified sunglasses found at the scene as belonging to Julio.

Blanca B. lived with Mike in his apartment. She saw Julio the night he died. Julio regularly stayed at the apartment and indicated his intent to do so that evening. Blanca

left the apartment at approximately 8:00 p.m. She did not find any of Julio's property in the apartment after his death.

Law Enforcement Investigation

Law enforcement officers responded to the scene. Julio was found face-up on the dirt path, approximately 50 to 55 feet north of East Cameron Street. He had multiple gunshot wounds and showed no signs of life. His pants were unbuttoned, partially unzipped, and sitting below his waistline, exposing boxer shorts beneath. His pockets were not turned out. Both of his shoes were off and there was fresh dirt on the bottoms of his socks, indicating at some point he had been on his feet without shoes.

On the path, officers observed shoe prints for both a right and left shoe, consistent with the Vans shoe found at the scene, facing north toward Sierra Liquor. Officers also observed a second set of shoe prints facing south. A few feet away from the body, officers located one size ten-and-a-half men's Vans shoe. To the south, they found six wrapped Mexican style candies, and loose change. To the west of the southern trailhead on East Cameron Street, they found a black plastic bag, a pair of sunglasses, and a black and red t-shirt. Other debris was found north of the body, including a liquor bottle, styrofoam cup, and basketball shorts.

Ten shell casings were found to the northeast and east of Julio's body. A forensics expert opined that all ten casings were expelled from the same firearm. The same expert opined that 3 of the 6 projectiles retrieved from Julio's body were consistent with a .40 caliber projectile.[4] She determined any one of four Glock models could have expelled these casings: a 10-millimeter auto Glock model 20, a .40 caliber Smith and Wesson Glock model 22, a .40 caliber Smith and Wesson Glock model 23, or a .40 caliber Smith and Wesson Glock model 27. These weapons can accommodate an external magazine that can hold up to 30 rounds.

[4] The other three projectiles were fragments for which no conclusion could be reached.

A detective determined it takes approximately two minutes to walk from Sierra Liquor to the location of the body while walking at a normal pace.

Katherine flagged down Corporal Dale Williams as he was responding to the scene. She informed him that she had seen a person running. Approximately 8 to 10 minutes later, Katherine contacted him again to provide information about a vehicle she had seen. His conversations with Katherine were audio and video recorded.

On the morning of June 21, 2016, police officers found a California identification card bearing Gonzalez's name in the street near the North White Street residence. The card was issued in November 2013.

Defense Case

Gonzalez's father testified he has three sons, of whom Gonzalez is the youngest. In June 2016, Gonzalez resided in the North White Street residence with his girlfriend, his father, and occasionally one of his brothers.

Gonzalez's brother testified that, on the afternoon of June 21, 2016, he found Gonzalez's California identification card in Gonzalez's wallet inside the North White Street residence. The identification card was issued in February 2016.

A private investigator testified regarding various distances she measured between locations in the area of the field, East Cameron Street, and North White Street.

Corporal Williams was called as a defense witness to testify regarding the lighting in the area of East Cameron and North White Streets and his discussions with Katherine. His discussions with Katherine are discussed in greater detail below in relation to Gonzalez's challenge to this testimony.

Law enforcement witnesses testified that they did not canvass the North White Street residence the night of the shooting or prior to the morning of June 21, 2016.

The parties stipulated that Julio was the main contributor to DNA found in his own fingernail scrapings. Gonzalez was eliminated as a major contributor. No DNA typing results were obtained from the empty liquor bottle found in the field. Julio and Gonzalez

were eliminated as contributors to the DNA found in a sample taken from the Styrofoam cup found in the field.

The parties stipulated that latent fingerprints found on the Styrofoam cup and on a quarter did not contain enough detail for comparison. No prints were found on cartridge casings or the liquor bottle. Latent prints on the sunglasses and black plastic bag found in the field did not belong to Gonzalez.

DISCUSSION

I. Testimony that Katherine called Gonzalez "the Terror"

Gonzalez contends the court erred in permitting Corporal Williams to testify that Katherine called Gonzalez "the terror" or "the terrorist." Gonzalez contends this testimony was irrelevant, overly prejudicial, and impaired his federal constitutional right to a fair trial. The People contend the trial court cured any harm arising from this testimony. We conclude the admission of this testimony does not warrant reversal.

A. Additional Factual Background

When Katherine spoke to police, she told them that she calls Gonzalez "the terrorist." During Gonzalez's first trial, the court addressed the extent to which Katherine might be permitted to testify regarding this statement and other "prior bad acts" by Gonzalez. The People indicated they might wish to rebut any claim by the defense that Katherine was biased against Gonzalez by eliciting testimony regarding a drive-by shooting at Gonzalez's house that she reported to police. The court indicated testimony regarding Katherine speaking to the police about Gonzalez potentially being a victim of a crime could constitute permissible rebuttal evidence.

Defense counsel then raised concerns about "15 to 20 different statements" Katherine made to police about Gonzalez. The court instructed the parties to confer regarding these statements. The court also noted Katherine's reference to Gonzalez as "the terror" fell within a "grayish area" because this statement was relevant to show Katherine knew Gonzalez as someone in the neighborhood. Defense counsel agreed it

was relevant that Gonzalez was not a stranger to Katherine but argued her testimony in this regard should be limited. The People stated Katherine would not "be using choice words on the stand." The court cautioned defense counsel to be careful about impeaching Katherine: "You're not going to be able to come in and – if this witness knows Mr. Gonzalez because he is a terror in the neighborhood and she has witnessed this, to come in and portray that she is in [*sic*] inaccurate in her familiarity with Mr. Gonzalez. And then they are going to be able to testify how she knows him." The People clarified they would "ask her generally if she is familiar, and she has seen the defendant, how many times, that sort of deal." The court further clarified, "If [defense counsel] tries to portray him, Mr. Gonzalez as somebody she really doesn't know, or somebody she is not familiar with, then it becomes relevant."

After the parties conferred, defense counsel sought further guidance from the court regarding how she could impeach Katherine regarding potential bias against Gonzalez while also "limiting what [the People] can bring in." The court then held an Evidence Code section 402 hearing, in which Katherine testified. The court then ruled as follows:

> "… I am assuming that the question is going to be pretty simple and straightforward, and is going to be something like, '[Katherine], are you biased against my client Mr. Gonzalez?' And she is going to do one of two things. She is going to say no. If she does say no and you would like to impeach her with that statement of – in the transcripts that – get rid of this person he is a terror, and you do that, it is the court's position that the prior acts that she witnessed would be admissible for her state of mind. You have opened the door. If she says no – if she says yes, then that is it she is biased."

The issue of testimony regarding Gonzalez being "the terror" was raised again prior to Gonzalez's second trial:

> "[DEFENSE COUNSEL]: The only other thing, I just wanted to make it clear we are objecting, again, to any reference of prior bad acts, shootings, etc., regarding Zachary Gonzalez and his residence. We are asking none of that be brought in through [Katherine] or anybody else. No reference to him being a terror or bad kid or anything like that. We are not

planning on opening the door with regards to bias or anything like that, as discussed at the last trial.

[THE COURT]: Agreed, [prosecutor]?

[THE PROSECUTOR]: Yes, your Honor, provided with, obviously, that if [defense counsel] intends to question [Katherine] about her bias, then, that will probably open the door to explaining her bias.

[THE COURT]: Okay."

In the second trial, Corporal Williams was called as a witness by both the prosecution and the defense. During the defense case, Corporal Williams made several statements regarding Katherine's identification of Gonzalez as "the terror."[5] The first such statement was made during defense counsel's direct examination:

"Q: Okay. And during your conversation with her was she – did she provide you with some information as to the birth order of the person who she saw, whether oldest, youngest, middle, anything like that?

¶ … ¶

A: Yes.

Q. Okay. What specifically did she tell you about that?

A. She said that she saw the middle brother and she couldn't remember his first name, but that she knows him as the terror because – and that he's the shot caller."

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[5] We note two additional references to "the terror" were made during the People's case-in-chief, neither of which is challenged on appeal. In the first, Corporal Williams testified that Katherine told him she went outside after hearing gunshots and saw "the terror." The court sustained defense counsel's objection and struck the reference.

In the second instance, Corporal Gabriel Jimenez was asked to describe the admonishment he gave Katherine at a show-up identification. He testified, "And this person, I told her, may or may not be the person who she referred to as the terror or the person she saw running that night." Defense counsel did not object to this testimony.

Because Gonzalez does not challenge these references, we need not address them. Regardless, they do not alter our analysis.

Defense counsel moved to strike the response. The prosecutor pointed out the question was asked by defense counsel. The court ruled the answer was responsive to the question and therefore would stand.[6] During further questioning by defense counsel, Corporal Williams testified that Katherine told him at one point that she did not "see the guy" but that it was the older one.

On cross-examination by the prosecutor, the following testimony was elicited from Corporal Williams:

> "Q. When you first contacted [Katherine] she provided you a statement that the individual was running awful damn fast; isn't that correct?
>
> A. Yes, sir.
>
> Q. And she identified the individual as last name Gonzalez, correct?
>
> A. Yes.
>
> Q. Identifying the individual as the terrorist?"

Defense counsel immediately objected to this question on relevance grounds and the objection was sustained. Although Corporal Williams did not respond to the question, defense counsel's motion to strike was granted. The prosecutor continued, apparently questioning Corporal Williams from the transcript of his recorded conversation with Katherine:

> "Q. And, then, just to clarify, you asked [Katherine] did you see this guy shooting, correct?
>
> A. That's correct.
>
> Q. And that's the time when she said no, correct?
>
> A. Yes, that's correct.

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[6] As explained below, the court later revised this ruling.

Q. So she didn't tell you she didn't see the person running; isn't that correct?

A. That is correct.

Q. And your question – and this is the first time you spoke to [Katherine]?

A. Yes, sir.

Q. And you said did you know – did you see who it was and her response was it's the older one, correct?

A. Correct.

Q. And, then, you asked the older one, you said his name is Gonzalez, and her response was, yeah, like I said, I just call him the terrorist?

[DEFENSE COUNSEL]: Objection. Your Honor. May we approach?

THE COURT: Continue on.

[THE PROSECUTOR]: Is that correct?

A. That's correct."

The prosecutor continued:

"Q. So … Corporal Williams, rather, you said do you know if his first name is Brian Gonzalez. He's the older guy. And [Katherine's] answer was might – yeah, it might be, but I'm not really sure because they – and then, your response, Corporal Williams, was he's the older one, though, right. And [Katherine's] response was, um. And, then, you said that older brother; isn't that correct?

A. Yes, sir, that's correct.

Q. And, then, [Katherine] answered he's the middle – well, there's the oldest one is – doesn't – isn't involved in that crap. He's married and has a kid and stays away from that shit. Isn't that correct?"

The prosecutor proceeded to question Corporal Williams in further detail regarding Katherine's description of the person she saw running. The testimony was permitted over defense counsel's hearsay objection. The prosecutor continued:

> "Q. And that – and, then, the next question was, okay, and he's the middle brother out of the brothers. And her response was yes, correct?
>
> A. Yes, that's correct.
>
> Q. And did she also say it's not the older one and it's not the younger one. The younger one is too short. Is that correct?
>
> A. Yes, sir, that's what she said."

Outside the presence of the jury, the court revisited its ruling on defense counsel's objection to Corporal Williams's earlier statement, "She said that she saw the middle brother and she couldn't remember his first name, but that she knows him as the terror because – and that he's the shot caller." The court concluded part of this answer was not responsive to defense counsel's question regarding birth order. The People argued the answer went to identity, and the court agreed the information was "very relevant in that that's how she knows him." The court further noted the prosecution "got terror in on another portion based on a prior consistent statement" and concluded that was sufficient. Ultimately, the court ruled, "I'm going to sustain the objection that was nonresponsive and let the portion regarding it was the middle brother remain. The remainder will be stricken."

To remedy the error, the court proposed reading the question and the portion of the answer that remained standing, while stating that the remainder of the answer was stricken without repeating the stricken portion for the record. Both parties agreed to this course of action. The court instructed the jury:

> "Ladies and gentleman, before the attorneys give their closing arguments I have reconsidered a prior ruling that I made when Dale Williams was responding to [defense counsel's] questions regarding his interview with [Katherine]. I'm now going to read the question that was

asked and the answer into the record and that will be the evidence that you are to consider.

The question is this: And during your conversation with her was she -- did she provide you with information as to the birth order of the person who she saw, whether oldest, youngest, middle, anything like that? What specifically did she tell you about that? Answer, she said that she saw the middle brother. The remaining portion of the that is stricken and will not be considered by the jury."

B. Applicable Legal Standards

Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.) A trial court's determination regarding relevance is reviewed for abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 474.) Under this standard, the exclusion of evidence will be upheld unless the trial court acted arbitrarily, capriciously, or in a patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Lucas* (2014) 60 Cal.4th 153, 240, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn.19; *People v. Ledesma* (2006) 39 Cal.4th 641, 705.)

Under Evidence Code section 352, evidence is inadmissible if the court determines " 'its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury.' " (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028-1029.) Undue prejudice arises if the evidence " 'poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" ' " (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) A trial court's ruling under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 586 (*Clark*).)

"[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*).) Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional test articulated in *People v. Watson* (1956)

46 Cal.2d 818, 836. "The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Partida, supra,* 37 Cal.4th at p. 439.)

C. Analysis

Evidence that Katherine knew Gonzalez as "the terror" was relevant to show her familiarity with him as someone in her neighborhood and thus her ability to identify him when she saw him running from the area of the dirt path after the shooting. The trial court did not abuse its discretion in so holding. We reject Gonzalez's claim this evidence was irrelevant.

However, the trial court also recognized the term "terror" held the potential for prejudice. Accordingly, the court initially held this evidence would be admissible only if the defense tried to portray Gonzalez as someone with whom Katherine was unfamiliar. Ultimately, the trial court permitted the prosecutor to question Corporal Williams regarding Katherine's identification of Gonzalez as "the terrorist" under the doctrine of completeness and in an attempt at rehabilitation. The reference came after defense counsel's questioning elicited seeming inconsistencies between Corporal Williams's testimony and Katherine's own testimony regarding which brother she identified and whether she had even seen this individual, thereby raising an inference that Katherine was unable to reliably identify Gonzalez. We cannot say the court abused its discretion in concluding the evidence of Katherine's prior statement was more probative than prejudicial when utilized for this purpose. (Evid. Code, §§ 356, 791, 1236.)

In two other challenged instances, the court sustained defense counsel's objection to the reference. In the first instance, the court initially allowed Corporal Williams's answer to stand but later sustained the objection, re-read the permissible portion of the answer, and instructed the jury to disregard the rest. We note that Gonzalez's trial counsel expressly agreed to this curative procedure. The second reference occurred during a question by the prosecutor; no response was made by the witness.

The jury was instructed that the questions of counsel are not evidence, and they were not to presume something is true simply because of an attorney's question. They also were instructed that they must disregard stricken testimony and must not consider it for any purpose. " 'We presume that jurors understand and follow the court's instructions.' " (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.) We therefore presume the court's instructions cured any harm arising from these two references to Gonzalez as "the terror." In any event, these references did not add any detail regarding the prior bad acts that led Katherine to give Gonzalez this nickname, and therefore added nothing to the other, properly admitted reference to "the terror."

In light of these conclusions, there was no erroneous admission of evidence which might present a due process issue. (See *Partida, supra,* 37 Cal.4th at pp. 436-438.) The references to "the terror" were not so prejudicial as to render appellant's trial fundamentally unfair.

II. Admission of Gonzalez's Identification Card

Gonzalez contends his California identification card should have been excluded from trial as "fruit of the poisonous tree." Alternatively, he contends the card was irrelevant and its admission therefore violated his right to a fair trial. We conclude the evidence was not "fruit of the poisonous tree" and was admissible.

A. Additional Factual Background

On June 21, 2016, police officers found Gonzalez's California identification card, which was issued in November 2013, on the curb on the east side of North White Street, opposite his house. The identification card was found immediately before the police executed a search warrant on the North White Street residence. During Gonzalez's first trial, the court traversed and quashed that search warrant due to material factual omissions by law enforcement in the affidavit supporting the warrant request. The court also suppressed evidence obtained through that warrant.

In Gonzalez's first trial, the People represented the identification card was found in the area where Katherine observed an individual getting into a car on the night of the shooting and therefore sought to introduce the identification card to show Gonzalez was that individual. Defense counsel argued the identification card was irrelevant, prejudicial, and constituted fruit of the poisonous tree because the police were only on North White Street to execute the now-quashed warrant. The court ruled the identification card had very "tenuous relevancy" but tentatively ruled it was not fruit of the poisonous tree because the officers were "in a place they could be" and the discovery was "inevitable." Ultimately, the court ruled the card was not fruit of the poisonous tree because it was found in plain view in a place the officers had a right to be.

At Gonzalez's second trial, defense counsel again objected to admission of the identification card as irrelevant and fruit of the poisonous tree. The court again rejected these arguments. The court stated, "[I]t's not the fruit of the poisonous tree in that it would be inevitably discovered in that this was a crime scene. The whole area was a crime scene and it would have been inevitably discovered and it is relevant."

B. Analysis

The Fourth Amendment and the California Constitution protect against unreasonable searches and seizures. (U.S. Const., 4th Amend.; Cal. Const., art I, § 13.) Relatedly, the exclusionary rule bars the admission of evidence obtained through an unlawful search or seizure. (*Mapp v. Ohio* (1961) 367 U.S. 643, 656; see *People v. Sanders* (2003) 31 Cal.4th 318, 334-335 (*Sanders*).) The "fruit of the poisonous tree" doctrine extends the exclusionary rule to derivative or secondary evidence that is tainted by the initial Fourth Amendment violation. (*Nardone v. United States* (1939) 308 U.S. 338, 340-341 (*Nardone*).) The purpose of the exclusionary rule is to deter unconstitutional misconduct and preserve judicial integrity. (*Sanders, supra,* 31 Cal.4th at p. 334.)

The standard for determining whether evidence must be excluded as fruit of the poisonous tree is the same under both state and federal law. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) Evidence that would not have come to light without the illegal actions of police may be subject to exclusion. (*Wong Sun v. United States* (1963) 371 U.S. 471, 488 (*Wong Sun*).) However, the United States Supreme Court has rejected a strict "but for" test, focusing instead on " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " (*Ibid.*; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1092-1093.) Thus, evidence with only an attenuated or remote relationship to the illegal search or seizure need not be suppressed, because such evidence does not serve the exclusionary rule's purpose of deterring unlawful police conduct. (*Nardone, supra,* 308 U.S. at p. 341; *Wong Sun, supra,* 371 U.S. at p. 487; *Brown v. Illinois* (1975) 422 U.S. 590, 608-609 [conc. opn. of Powell, J.].) Similarly, the exclusionary rule does not apply where the government learned of the evidence from an additional, independent source (*Wong Sun, supra,* 371 U.S. at p. 487), or where the evidence would inevitably have been discovered lawfully even if no constitutional violation had occurred (*Nix v. Williams* (1984) 467 U.S. 431, 434).

Here, Gonzalez's identification card was found on a public street before the unlawful search even began. Although the police were on the street for purposes of executing the warrant, it cannot be said that they exploited any illegality in the warrant to find the identification card. The relationship between the identification card and the unlawful search is simply too attenuated to warrant exclusion under the "fruit of the poisonous tree" doctrine. No constitutional purpose would be served by deterring officers from confiscating evidence abandoned in a public place.

Even assuming the relationship between the identification card and the illegal search was not so remote, we agree with the trial court that any taint was dissipated by

the likelihood of inevitable discovery. As the trial court properly recognized, the officers were in a public place near the location of a serious crime and where a suspect was believed to reside. The identification card inevitably would have been discovered whether or not officers obtained a warrant for a search of the North White Street residence.

Because the identification card does not constitute "fruit of the poisonous tree," the exclusionary rule is not implicated. The Fourth Amendment does not otherwise protect Gonzalez's interest in the identification card. (*Minnesota v. Carter* (1998) 525 U.S. 83, 88 [defendant must demonstrate his expectation of privacy in the place searched or the thing seized is reasonable]; *People v. Jenkins* (2000) 22 Cal.4th 900, 972.) It is well-settled that individuals have no expectation of privacy in property abandoned in a public place. (*People v. Thomas* (2011) 200 Cal.App.4th 338, 342; *California v. Greenwood* (1988) 486 U.S. 35, 39-43.) Nor did Gonzales have, as he claims, a reasonable expectation of privacy in the *contents* of his identification card. (See *People v. Leath* (2013) 217 Cal.App.4th 344, 353 [collecting cases].) "What a person knowingly exposes to the public … is not a subject of Fourth Amendment protection." (*Katz v. United States* (1967) 389 U.S. 347, 351.)

Finally, we reject Gonzalez's contention that reversal is required because the identification card was irrelevant. We agree with the trial court that this evidence had only very "tenuous relevancy" because it was found more than three days after the shooting and in a location Gonzalez was known to frequent, i.e., the street where he lived. Its tendency to prove Gonzalez left in a vehicle shortly after the shooting is limited, but not nonexistent. In any event, given the minimal probative value of this evidence, we find no likelihood Gonzalez was prejudiced by its admission.

In sum, the trial court did not err in admitting the identification card evidence.

III. Sufficiency of the Evidence

Gonzalez challenges the sufficiency of the evidence to support his convictions for murder, robbery, and the robbery special circumstance. In reviewing the sufficiency of the evidence, " 'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*Cravens,* 53 Cal.4th at p. 508.) The standard of review is the same in cases in which a conviction is based primarily on circumstantial evidence. (*Clark, supra,* 63 Cal.4th at p. 625.)

A. First Degree Murder

Gonzalez contends there is insufficient evidence to support his conviction for first degree murder. He contends the only evidence connecting him to the offense is Katherine's eyewitness identification. According to Gonzalez, this identification is too unreliable to constitute substantial evidence. He does not challenge the sufficiency of the evidence to support any element of the offense other than identity.

In effect, Gonzalez urges us to hold as a matter of law that eyewitness identification testimony of a single witness is insufficient to support a conviction if certain factors are present that could call the witness's reliability into question. Case law holds to the contrary. "Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction." (*People v. Elliott* (2012) 53 Cal.4th 535, 585 (*Elliott*); see also Evid. Code, § 411.) Any doubts about identification are for the trier of fact to resolve. (*Elliott, supra,*

at p. 585.) "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, [and] where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

Here, Katherine identified Gonzalez out-of-court as the person she saw running and confirmed that identification at trial. She was at all times certain Gonzalez was the person she had seen. Factors relating to the conditions under which she made her identification and any bias on her part were factors for the jury to weigh. (*People v. Williams* (1973) 9 Cal.3d 24, 37, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Gonzales* (1968) 68 Cal.2d 467, 472.) The jury was instructed that such factors could be considered in determining whether to credit an eyewitness identification. We do not second-guess the factual determinations of a properly instructed jury.

In any event, we reject the argument that Katherine's identification was the only evidence connecting Gonzalez to the offense. The jury heard extensive circumstantial evidence implicating Gonzalez. The manager of Sierra Liquor was very familiar with Gonzalez and had seen him use the dirt path where the shooting occurred on numerous occasions. Employees of Sierra Liquor, who also were very familiar with Gonzalez, saw him enter the store from the area of the dirt path before the shooting. He was wearing a two-tone shirt, like that described by Katherine. He exited the store heading in the direction of the dirt path. Soon thereafter, an employee heard gunshots. Gary saw a man in a two-tone shirt stumbling in the field in the area where the body was found before running south and then west on East Cameron Street. Katherine saw Gonzalez, wearing a two-tone shirt and running in a southwesterly direction on East Cameron Street before entering a breezeway at the L&L Apartments and exiting onto North White Street near the Gonzalez residence. Significantly, the manager of Sierra Liquor had seen Gonzalez

on a prior occasion in possession of a firearm of the type believed to have been used in this offense.

Taken together, this evidence is sufficient substantial evidence for a jury to conclude beyond a reasonable doubt that Gonzalez had committed the offense.

B. Robbery Conviction and Robbery Special Circumstance

Gonzalez contends there was insufficient evidence to support the robbery conviction because there was no evidence he took property from Julio. Similarly, he contends the robbery special circumstance is unsupported because there was no evidence he took property from Julio before or during the killing. We disagree.

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) A robbery special circumstance applies when a murder takes place during the commission of a robbery. (§ 190.2, subd. (a)(17)(A).) In other words, the special circumstance requires a showing the defendant formed a separate intent to commit the robbery before or during the killing. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1079-1080 (*Koontz*).)

Here, the People presented testimony that Julio was in possession of his phone, wallet, necklace, sunglasses, hat, and a lottery ticket in the hours preceding the shooting. Surveillance video from that evening shows Julio wearing a necklace, hat, and sunglasses. Julio's mother and friend testified that he carried his phone with him everywhere he went. After Julio's body was found in the field, his wallet, necklace, phone, watch, and lottery ticket were not located. One of his shoes was missing and the other was found near the body. His sunglasses were found near the trailhead on East Cameron Street. Loose change and candies of the type Julio was known to carry were found to the south of the body. Julio's pants were unbuttoned and partially pulled down, which could be interpreted as evidence he was searched. We acknowledge there is no direct evidence Gonzalez had Julio's property in his possession. However, the evidence

is nonetheless sufficient, when viewed in the light most favorable to the verdict and when combined with the evidence of identity, to support a reasonable inference that Gonzalez took Julio's property.

Additionally, Julio's shoes and socks provide evidence that Gonzalez committed the murder during the commission of a robbery. Fresh dirt on the bottoms of Julio's socks reflect that at some point he was standing in socks without shoes. In other words, his shoes were removed before he went to the ground. As stated, one of those shoes was missing, indicating the shoes were part of the robbery. The evidence Julio's shoes were removed prior to the murder is sufficient for a juror to conclude the intent to commit robbery was formed prior to the murder. (See *Koontz, supra*, 27 Cal.4th at pp. 1079-1080.)

Accordingly, the evidence is sufficient to support both the robbery count and the robbery special circumstance.

IV. Prior Prison Term Enhancement

In the trial court, Gonzalez admitted to having served one prior prison term pursuant to section 667.5, subdivision (b). Based on this single prior prison term, the court enhanced Gonzalez's sentence on count 1 by one year, and also imposed and stayed a one-year enhancement on count 2. Both Gonzalez and the People contend the prior prison term enhancement on count 2 must be stricken. We disagree.

In support of their argument, Gonzalez and the People rely on *People v. Tassell* (1984) 36 Cal.3d 77, 89-91 (*Tassell*), overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 387, 401. There, our Supreme Court considered whether the trial court properly applied the same prior prison term enhancements to each of two determinate terms. (*Id.* at pp. 91-92.) Relying on section 1170.1,[7] the Supreme Court

[7] "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a

concluded the enhancements should have been applied only once to the aggregate sentence, regardless of the number of determinate terms. (*Ibid.*)

However, our Supreme Court subsequently determined that *Tassell* does not govern the imposition of status enhancements, such as those for prior serious felony convictions, when the sentence is comprised of multiple indeterminate sentences imposed under the three strikes law. (*People v. Williams* (2004) 34 Cal.4th 397, 402-403 (*Williams*).) The court explained: "As this court has stated, '[t]he consecutive sentencing scheme of section 1170.1 does not apply to indeterminate life terms, and therefore it has no application to sentencing calculations for three strikes defendants.' [Citations.] Because *Tassell* relied on section 1170.1, which does not apply to third strike sentences, it is not controlling or even helpful here in this significantly different context." (*Williams, supra,* at pp. 402–403.) The court concluded that imposing a five-year prior serious felony enhancement to each count of a third strike sentence was consistent with the logic and intent of the three strikes law and statute governing prior serious felony enhancements. (*Id.* at pp. 404-405.)

In *People v. Sasser* (2015) 61 Cal.4th 1, 6-7, the court considered whether multiple prior serious felony conviction enhancements could be applied to each of multiple second-strike sentences. The court observed that second-strike sentences, unlike third-strike sentences, are determinate sentences governed in part by section 1170.1. (*Id.* at p. 13.) Consistent with *Tassell*, the court concluded the enhancements thus could only be applied once to the aggregate term. (*Id.* at p. 15.)

In *People v. Minifie* (2018) 22 Cal.App.5th 1256, 1261-1265 (*Minifie*), the Second District Court of Appeal extended the reasoning of *Williams* to indeterminate sentences

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different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1…." (§ 1170.1, subd. (a).)

imposed based on the nature of the offense, rather than the three strikes law. In that circumstance, the court held that the same prior prison term enhancement could be applied to both a determinate term and an indeterminate term. (*Ibid.*)

We agree with *Minifie*'s interpretation of our Supreme Court precedent. The limitation on imposing status enhancements on more than one count arises under section 1170.1. (*Tassell*, *supra*, 36 Cal.3d at pp. 89-91.) Section 1170.1 does not apply to indeterminate sentences, regardless of whether they are imposed under the three strikes law or the law governing a substantive offense. (See § 1168, subd. (b) [governing indeterminate sentencing].) Following *Williams*, we are compelled to conclude the same prior prison term enhancement may be applied to both a determinate term and an indeterminate term.

Here, Gonzalez received an indeterminate sentence on count 1 and a determinate sentence on count 2. The court properly imposed a prior prison term enhancement on each count.

V. Firearm Enhancement

Senate Bill No. 620, signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1.)

The legislation thus granted trial courts new discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53.

Here, the trial court imposed a firearm enhancement of 25 years to life under section 12022.53, subdivision (d). The People concede Senate Bill No. 620's amendment to section 12022.53 is retroactively applicable to this case under *In re Estrada* (1965) 63 Cal.2d 740, 745, because it potentially mitigates punishment. (See *People v. Woods*

(2018) 19 Cal.App.5th 1080, 1090-1091 [applying Senate Bill No. 620 to case not yet final when law became effective], *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [same].)

However, the People initially contended remand is not required because the court evidenced its intent not to strike the enhancements by finding no factors in mitigation and in imposing "the maximum sentence possible on counts 1 and 2." In a later-filed response to the petition for rehearing, the People conceded the matter must be remanded for possible resentencing. In any event, in imposing the then-mandatory consecutive sentence of 25 years to life for the firearm enhancement in this matter, the trial court made no statement to indicate it would have imposed the enhancement, even if it had discretion to do otherwise. Accordingly, we will remand for the trial court to exercise its discretion as to whether to resentence Gonzalez on the firearm enhancement. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [remanding where the record "[does] not clearly indicate that [the trial court] would have imposed the same sentence had [it] been aware of the full scope of [its] discretion"].)

VI. Ability to Pay Fines and Fees

Gonzalez's sentence includes a $60 court facility fee (Gov. Code, § 70373), an $80 court operations assessment (§ 1465.8), a $10,000 restitution fine (§ 1202.4, subd. (b)), and a $10,000 parole revocation fine (§ 1202.45). He contends the fines and fees must be vacated and the matter remanded for the court to determine his ability to pay in light of *Dueñas, supra,* 30 Cal.App.5th at p. 1168. The People contend, on various grounds, we should not strike the fines or fees. The People concede the issue of Gonzalez's ability to pay may be addressed on remand, but only upon a request by Gonzalez in the trial court. The People therefore contend we should not direct the trial court to hold an ability-to-pay hearing but should instead require Gonzalez to make this request on remand.

Dueñas involved a homeless probationer who suffered from cerebral palsy and was unable to work. (*Dueñas, supra,* 30 Cal.App.5th at p. 1160.) Her driver's license was suspended after she failed to pay citations she received as a teenager. (*Id.* at p. 1161.) She was then convicted of a series of misdemeanors for driving with a suspended license and accrued debt from related fees. (*Id.* at p. 1161.) Upon her fourth conviction for driving with a suspended license, she argued due process entitled her to a hearing on her ability to pay before the fees were imposed. (*Id.* at 1162.) The court held an ability-to-pay hearing and determined Dueñas was indigent and unable to pay public defender attorney fees. (*Id.* at 1163; see § 987.8, subd. (b) [requiring court to find present ability to pay before ordering defendant to pay all or part of the cost of legal assistance].) However, the court rejected the argument that due process and equal protection required the court to consider ability to pay in imposing the remaining fines and fees. (*Ibid.*)

On appeal, Division Seven of the Second District Court of Appeal concluded due process "requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas, supra,* 30 Cal.App.5th at p. 1164.) The panel also held that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

Subsequently, the same court that decided *Dueñas* (although a different panel) rejected the argument that *Dueñas* places a burden on the People to prove a defendant's ability to pay in the first instance. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489-490 (*Castellano*).) *Castellano* clarified the defendant in *Dueñas* had demonstrated her inability to pay in the trial court and, only in that circumstance had the appellate court

concluded fees and assessments could not constitutionally be assessed and restitution must be stayed until the People proved ability to pay. (*Id.* at 490.) However, it remains the burden of the defendant to raise inability to pay, and to produce evidence supporting this claim: "a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*Ibid.*)

Here, Gonzalez did not contest his ability to pay fines, fees, or assessments in the trial court. However, it is undisputed he may do so on remand.[8] (*Castellano, supra,* 33 Cal.App.5th at pp. 490-491.) At such hearing, Gonzalez bears the burden of presenting evidence of his "inability to pay the amounts contemplated by the trial court." (*Id.* at p. 490.)

[8] Gonzalez expresses concern the trial court might deny such request. However, following *Dueñas*, a criminal defendant is entitled, upon request, to an evidentiary hearing on his or her ability to pay fines, fees, and other assessments.

DISPOSITION

We remand for the trial court to exercise its discretion to consider striking the firearm enhancements pursuant to Penal Code section 12022.53, subdivision (h). Additionally, on remand, Gonzalez may request a hearing on his ability to pay any fines, fees, and assessments. In all other respects, we affirm.

_____
SNAUFFER, J.

WE CONCUR:

_____
FRANSON, Acting P.J.

_____
SMITH, J.